United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2634

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -

April Term 1975

Docket 74-2634

- -

JOSE GIL OJEDA-VINALES,

Appellant,

-against-

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

- -

PETITION FOR REVIEW OF AN ORDER OF THE BOARD
OF IMMIGRATION APPEALS

APPELLANT'S BRIEF

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Statement of the Issue

Whether the facts of the appellant's identity and illegal presence in the United States were obtained as the result of an illegal arrest thereby requiring the suppression of the evidence resulting therefrom because the arrest was made without warrant and by virtue of the uncorroborated tip of an anonymous informer.

Statement of the Case

Pursuant to Section 106(a) of the Immigration & Nationality Act, 8 U. S. C. Sec. 1105(a), appellant petitions this Court for review of a final order of deportation entered against him by the Board of Immigration Appeals on November 21, 1974. That order dismissed the petitioner's

appeal from an order of a Special Inquiry Officer finding him deportable as an alien who had overstayed his temporary visit.

The petitioner had argued that the Immigration Service had arrested him without probable cause and without a warrant, and that there was no independent evidence to justify probable cause or reasonable suspicion and that he was arrested on the basis of an anonymous tip without the verification by the Immigration Service of the source of said tip.

Statement of the Facts

Appellant is a married male alien, a native and citizen of Paraguay. He last entered the United States on or about October 24, 1972, as a non-immigrant visitor for pleasure authorized to remain in the United States until December 31, 1972. It is conceded that he failed to depart on or before that date and remained in the United States longer than authorized. At the deportation hearing the appellant did not concede deportability but argued that there was an illegal arrest and that consequently all the facts acquired by virtue of the illegal arrest should be suppressed.

The Immigration Judge on the 11th of January 1974 found appellant deportable but afforded him the privilege of voluntary departure; he rejected the contention that there was an illegal arrest and that the evidence obtained should be suppressed; he upheld the Immigration officer's questioning of appellant pursuant to statutory authority given under Sec. 287(a)(1) of the Immigration and Nationality Act to interrogate

without warrant any person believed to be an alien as to his right to be or remain in the United States.

Appellant filed his petition for review of the Board's order on December 17, 1974.

Relevant Statutes

Immigration & Nationality Act, 66 Stat. 163 (1952) as amended:

Section 287(a)(1) and (2), 8 U.S.C. 1357.

"Any officer or employee of the Service (INS) authorized under regulations prescribed by the Attorney General shall have power without warrant --

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . . . "

ARGUMENT

SINCE THE ONLY EVIDENCE SUPPORTING DEPORTATION WAS BASED ON AN ANONYMOUS TIP, AND UNVERIFIED AS TO RELIABILITY, THE DEPORTATION PROCEEDINGS SHOULD HAVE BEEN TERMINATED.

The Supreme Court has held that for an arrest without warrant to be constitutional, the facts and circumstances within the knowledge of the arresting officer must be reasonably trustworthy and sufficient to enable a reasonable and prudent man to form a judgment that the suspected

person had committed or was committing an offense. Beck v. Ohio (1964), 379 U. S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223. Officers cannot arrest on the basis of mere suspicion. Wong Sun v. U. S. (1963), 371 U. S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407. A "reliable" informer may be used provided that some of the information provided has been verified. Draper v. U. S. (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329. In the case at bar the arresting officers had not obtained a warrant before the arrest, and they submitted no proof that they had availed themselves of a reliable informer or verified any of the information provided.

Consequently the Immigration Judge should have granted the motion to suppress and dismissed the case because the Immigration Service lacked clear, convincing and unequivocal legal evidence to prove that appellant was illegally within the United States.

A mere tip by an informer is not enough to create probable cause to arrest without a warrant. Even if a search warrant is obtained, the police must show more than an assertion by an informer. Certainly as much is required without a warrant. Recznik v. Lorain (1968), 393 U. S. 166, 21 L. Ed. 2d, 317, 89 S. Ct. 342. If less evidence were required for an arrest without a warrant, it would discourage resort to the procedures for obtaining a warrant. Whiteley v. Warden of Wyoming State Penitentiary (1971), 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031.

District Directors of the Immigration Service are authorized to issue warrants. See Abel.v. U. S., (1960), 362 U. S. 217, 4 L. Ed. 2d

668, 80 S. Ct. 683, reh. den. 362 U. S. 984, 4 L. Ed. 2nd 1019, 80 S. Ct. 1056. There was no justification here to dispense with a warrant since it was shown by the testimony of the arresting officers that there was ample time to obtain one.

The Immigration Judge in his decision stated that "The arrest was certainly a lawful one". He goes on to state that Section 287 of the Immigration and Nationality Act (8 U.S.C. 1357) authorizes the arrest of any alien in the United States if the Immigration and Naturalization Service has reason to believe that the aliens who are arrested are in the United States in violation of any laws.

At the time the appellant was accosted and told by the Immigration officers to accompany them to the Immigration Service for all practical purposes the respondent was apprehended and arrested. When he was told to accompany the Immigration officers to the Immigration Service he was not free to leave as the officers had identified themselves as Immigration officers. They did not ask him to accompany them; they told him to accompany them. For Section 287 to be constitutional, some probable cause or reasonable suspicion that the alien is illegally in the United States must be established. Before the Immigration officers arrested appellant, they had no reasonable suspicion or probable cause to arrest him.

In Condrado Almeida-Sanchez v. U. S., 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), the Court held that Section 287 of the Immigration and Nationality Act could not justify a warrantless search without probable cause. The Court stated that Section 287 does not declare a field day for

the government to arrest and search. The Court insisted upon probable cause as a minimum requirement.

In the case at bar there was no independent evidence to justify reasonable suspicion. Terry v. Ohio, 398 U. S. 1, 88 S. Ct. 1869, 20 L. Ed. 2d 889 (1968) has held that it intrudes upon constitutionally guaranteed rights if an arrest is based on nothing more than inarticulate hunches.

Conclusion

The decision of the Board of Immigration Appeals should be reversed and the deportation proceedings dismissed and terminated.

Respectfully submitted,

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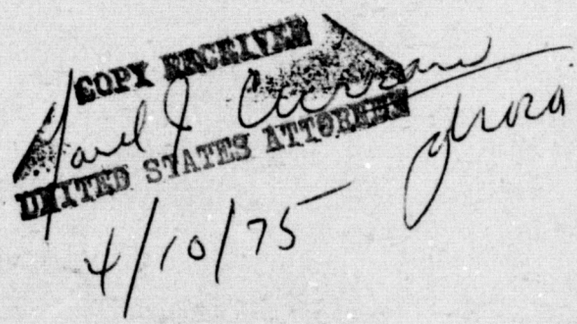
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